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No. 04-936

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NIBCO, INC.,
Petitioner,

v.

MARTHA RIVERA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Ninth Circuit's interlocutory ruling that the magistrate judge's fact-specific, discretionary discovery order was not "clearly erroneous" or "contrary to law"?

2. Should this Court grant certiorari to review language in the decision below that petitioner concedes is dicta, particularly where the issue has not yet been considered by any other court of appeals?

LIST OF PARTIES

Respondents adopt petitioner's "Parties to the Proceeding Below," except that due to typographical errors below, "Eva Ariola" should appear as "Eva Arriola," and "Maria Domitilia Medina" should appear as "Maria Medina."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. CERTIORARI FOR INTERLOCUTORY DISCOVERY ORDERS IS HIGHLY DISFAVORED	6
II. BECAUSE THE MAGISTRATE JUDGE'S ORDER WAS NOT "CLEARLY ERRONEOUS," "CONTRARY TO LAW," OR AN ABUSE OF DISCRETION, REVIEW WOULD BE INAPPROPRIATE	9
A. The Ninth Circuit Held Simply That The Magistrate Judge's Fact-Based Rule 26 Balancing Was Not "Clearly Erroneous."	11
B. The Opinion Below Does Not Conflict With The Cases Petitioner Cites	15
III. THE DECISION BELOW CREATES NO SPLIT OF AUTHORITY BECAUSE IT IS THE FIRST COURT OF APPEALS OPINION TO ADDRESS *HOFFMAN*, AND BECAUSE THE LANGUAGE PETITIONER POINTS TO IS NOT PART OF THE HOLDING BELOW	21

TABLE OF CONTENTS—Continued

Page

A. The Ninth Circuit's Discussion Of *Hoffman*'s Applicability To Title VII Is Express Dicta 21

B. No Other Circuit Has Discussed *Hoffman*, Let Alone Attempted To Interpret It..... 22

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	14
American Construction Co. v. Jacksonville T. & K.W. Railway Co., 148 U.S. 372 (1893)	7
Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985)	12
Andover Data Services, a Division of Players Computer, Inc. v. Statistical Tabulating Corp., 876 F.2d 1080 (2d Cir. 1989)	16
Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004)	22
Brandt v. Wand Partners, 242 F.3d 6 (1st Cir. 2001)	10
Bunting v. Mellen, ___ U.S. ___, 124 S. Ct. 1750 (2004)	22
CSC Holdings v. Redisi, 309 F.3d 988 (7th Cir. 2002)	16
California v. Rooney, 483 U.S. 307 (1987)	22
Can-Am Plumbing, Inc. v. NLRB, 321 F.3d 145 (D.C. Cir. 2003)	22
Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59 (W.D.N.Y. 2003)	13
Cheney v. United States District Court, 540 U.S. ___, 124 S. Ct. 2576 (2004)	8
Church of Scientology v. United States, 506 U.S. 9 (1992)	7
Cobbledick v. United States, 309 U.S. 323 (1940)	7
Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F.Supp.2d 1053 (N.D. Cal. 1998)	13
Cortez v. Medina's Landscaping, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002)	13
Courier-Journal v. Marshall, 828 F.2d 361 (6th Cir. 1987)	16

TABLE OF AUTHORITIES—Continued

	Page
Dodge v. Hunt Petroleum Corp., 1998 WL 355495 (N.D. Tex. June 26, 1998)	18
Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058 (9th Cir. 2000)	12
Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979)	7
EEOC v. Fargo Assembly Co., 142 F.Supp.2d 1160 (D. N.D. 2000)	19
EEOC v. First Wireless Group, Inc., ___ F.R.D. ___, 2004 WL 2733612 (E.D.N.Y. Nov. 19, 2004)	13
Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998)	22
Finch v. Hercules Inc., 1995 WL 785100 (D. Del. Dec 22, 1995)	19
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	7
Flores v. Albertsons, Inc., 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002)	14
Flores v. Amigon, 233 F.Supp.2d 462 (E.D.N.Y. 2002)	14
Garrett v. Langley Federal Credit Union, 121 F.Supp.2d 887 (E.D. Va. 2000)	19
In re Grand Jury Subpoenas, 836 F.2d 1468 (4th Cir. 1988)	16
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916)	7, 8
Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB, 280 F.3d 1110 (7th Cir. 2002)	17
Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002)	*passim*
Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117 (7th Cir. 1999)	20

TABLE OF AUTHORITIES—Continued

	Page
John Dory Boat Works, Inc., 229 N.L.R.B. 844 (1977)	12
Johnson v. Jones, 515 U.S. 304 (1995)	7
Kerr v. United States District Court, 426 U.S. 394 (1976)	7
Kulas v. Flores, 255 F.3d 780 (9th Cir. 2001)	9
Liu v. Donna Karan Intl., Inc., 207 F.Supp.2d 191 (S.D.N.Y. 2002)	14
Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *cert. granted, judgment vacated, and remanded, Harleysville Life Ins. Co. v. Mardell*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part by Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072 (3d Cir. 1995)	17
Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072 (3d Cir. 1995)	17, 19
McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995)	16, 17, 18
Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002)	22
Miller v. AT&T, 83 F.Supp.2d 700 (S.D. W.Va. 2000)	18
Montelongo v. Meese, 803 F.2d 1341 (5th Cir. 1986)	12
NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997)	13
NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)	14
NLRB v. Del Rey Tortilleria, Inc., 823 F.2d 1125 (7th Cir. 1987)	13
Nyazie v. Kennedy, 1998 WL 472504 (E.D. Pa. July 27, 1998)	19

TABLE OF AUTHORITIES—Continued

	Page
Osband v. Woodford, 290 F.3d 1036 (9th Cir. 2002)	9
Perry v. Best Lock Corp., 1999 WL 33494858 (S.D. Ind. Jan. 21, 1999)	18
In re Reyes, 814 F.2d 168 (5th Cir. 1987), *cert. denied sub nom. Griffin & Brand of McAllen v. Reyes*, 487 U.S. 1235 (1988)	12
Rivera v. NIBCO, Inc., 204 F.R.D. 647 (E.D. Cal. 2001)	2
Rivera v. NIBCO, Inc., 2001 WL 1688880 (E.D. Cal. Dec. 21, 2001)	2
Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004)	*passim*
Rivera v. NIBCO, Inc., 384 F.3d 822 (9th Cir. 2004)	6, 11
Rodriguez v. The Texan, Inc., 2002 WL 31061237 (N.D. Ill. Sept. 16, 2002)	14
Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)	9, 16
Singh v. Jutla & C.D. & R's Oil, Inc., 214 F.Supp.2d 1056 (N.D. Cal. 2002)	13
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984)	13
Topo v. Dhir, 210 F.R.D. 76 (S.D.N.Y. 2002)	14
Tuv Taam Corp., 340 N.L.R.B. No. 86, 2003 WL 22295361 (N.L.R.B.) (2003)	19
United States v. Nixon, 418 U.S. 683 (1974)	7
United States v. Ryan, 402 U.S. 530 (1971)	7
Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992)	18
FEDERAL STATUTES	
28 U.S.C. § 636(b)(1)(A)	9
28 U.S.C. § 1292(b)	2

TABLE OF AUTHORITIES—Continued

Page

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") ..... *passim*
National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 3

FEDERAL RULES

Fed.R.Civ.P. 26 ..... *passim*
Fed.R.Civ.P. 26(c) 2, 10, 14, 15
Fed.R.Civ.P. 72(a) 2, 9

FEDERAL ADMINISTRATIVE AUTHORITIES

EEOC Enforcement Guidance on After Acquired Evidence and *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 65 E.P.D. Par. 43 (1995). No. 915.002 (Dec. 14, 1995) 17
EEOC Directives Transmittal No. 915.002, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002) 14, 19
NLRB General Counsel Memorandum GC 02-06, *Procedures and Remedies for Discriminatees Who May be Undocumented Aliens after Hoffman Plastic Compounds, Inc.* (July 19, 2002) 14

STATE CASES

Hernandez v. Paicius, 109 Cal. App. 4th 452 (Cal. Ct. App. 2003) 20

STATE STATUTES

CAL. GOV'T CODE § 7285 20
California Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 *et seq.* 1

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Page

Cleeland, Nancy, *Unionizing is Catch 22 for Illegal Immigrants' Jobs: Undocumented Status Makes Them Vulnerable to Workplace Retaliation*, LOS ANGELES TIMES, Jan. 16, 2000 13

JAMES, F. & G. HAZARD, CIVIL PROCEDURE (3d ed. 1985) 10

Wishnie, Michael J., *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor,* 28 N.Y.U. R. LAW & SOC. CHANGE 389 (2004) 13

WRIGHT, C., A. MILLER & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1994, Supp. 2004) 10

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the California Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 *et seq.* Respondents Martha Rivera et al. are 23 Latina and Southeast Asian former employees of petitioner NIBCO, Inc. Their complaint states that petitioner terminated them because they were unable to pass tests that were administered only in English and unsupported by business necessity. Respondents allege that these terminations adversely impacted them on the basis of their national origin.

The facts giving rise to the matter at bar are straightforward. At the very outset of respondent Martha Rivera's deposition on May 14, 2001, petitioner's counsel asked and insisted upon answers to questions potentially relating to her

immigration status. Those questions included, among other things, where her marriage ceremony was performed and her place of birth. Petitioner's counsel also stated that he intended to ask other such questions of Ms. Rivera, such as her length of residence in the United States. Ct. App. Excerpts of Record ("ER") 0047-56. Respondents' counsel objected to, and ultimately instructed Ms. Rivera not to answer, those questions on the ground that they were irrelevant and potentially prejudicial. ER 0048-50, 0056. As a compromise, respondents' counsel proposed that the parties stipulate *inter alia* that any immigration-related testimony would be used solely for purposes of the litigation, would not be disclosed to third parties, and would not be used to terminate any respondent's current employment. ER 0048-51, 0059-64. Petitioner's counsel rejected that proposal, and also indicated that he intended to ask all respondents the same questions during their depositions. ER 0051-57.

Respondents' counsel thereupon adjourned the deposition to seek a protective order pursuant to Fed.R.Civ.P. 26(c) barring certain immigration-related questions and restricting the disclosure of respondents' testimony on questions not directly related to, but nonetheless potentially probative of, their immigration status. ER 0056-58, 0065-83, 0110-183. The magistrate judge granted a protective order on June 18, 2001. *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647 (E.D. Cal. 2001); Pet. App. 60a-69a. The district judge twice upheld the protective order, finding that it was not "clearly erroneous or contrary to law" pursuant to Fed.R.Civ.P. 72(a). *Rivera v. NIBCO, Inc.*, 2001 WL 1688880, *2 (E.D. Cal. Dec. 21, 2001); Pet. App. 55a-59a (order denying reconsideration on December 21, 2001); ER 0430 (orally denying reconsideration on April 22, 2002). In view of this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) ("*Hoffman*"), however, the district judge certified the matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on May 2, 2002. Pet. App. 70a-72a. The Court of

Appeals for the Ninth Circuit granted permission for the appeal on August 6, 2002. Pet. App. 73a. Subsequently, on September 17, 2002, the district court granted petitioner's motion to stay virtually all proceedings pending the appeal, and vacated all pretrial and trial dates. ER 0483.[1]

On appeal, petitioner argued that *Hoffman*, which disallowed backpay awards to undocumented workers under the National Labor Relations Act, mandated the unfettered discovery it sought. Specifically, petitioner asked the Ninth Circuit to find that *Hoffman* extended to Title VII to deny backpay to undocumented workers who had been subjected to unlawful discrimination. Petitioner moreover asserted that *Hoffman* should be understood to *require* the district court to order unrestricted discovery propounded for the stated purpose of determining respondents' entitlement to backpay, entirely irrespective of any harm to the respondents caused thereby. Pet. App 13a.

Employing the same standard of review applied by the district court, the Ninth Circuit determined that the magistrate judge did not exceed her discretion in finding that the sensitive nature of such discovery (at least at the liability phase) could have a chilling effect upon respondents that was likely to deter them from enforcing their rights under Title VII. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004); Pet. App. 1a-29a. In a unanimous opinion, the court observed:

> Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or

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[1] After the Ninth Circuit denied rehearing and rehearing en banc on September 20, 2004, respondents sought and were granted a trial date. Petitioner, however, has informed the district court that it will seek to have the stay reimposed if certiorari is granted.

> undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.

Pet. App. 10a. Accordingly, the court expressed substantial concerns about a per se rule requiring the district courts to grant such discovery in all instances, or eliminating a district court's discretion to fashion appropriate protective orders in all cases where immigration-related discovery was propounded.

Notably, despite petitioner's invitation to do so, the court below expressly declined to decide whether *Hoffman*'s reasoning should be extended to Title VII. Although it responded in detail to petitioner's contentions in this regard, Pet. App. 12a-18a, it ultimately concluded:

> We need not decide the *Hoffman* question in this case, however. Regardless whether *Hoffman* applies in Title VII cases, it is clear that it does not *require* a district court to allow the discovery sought here. No backpay award has been authorized in this litigation. Indeed, the plaintiffs have proposed several options for ensuring that, whether or not *Hoffman* applies, no award of backpay is given to any undocumented alien in this proceeding. Thus, the very problem NIBCO has identified may well never arise here.
>
> Perhaps even more important, . . . [t]he information NIBCO seeks is not relevant to determining whether it has violated Title VII. . . .
>
> The principal question to be decided in the action before us is whether NIBCO violated Title VII. It makes no difference to the resolution of that question whether some of the plaintiffs are ineligible for certain forms of statutory relief. NIBCO's contention that discovery regarding the plaintiffs' immigration status is essential to

> its defense is therefore without merit. Accordingly, we hold that the district court did not err when it declined to modify the protective order.

Pet. App. 18a-19a. Thus, the court explicitly declined to reach a conclusion about the availability of backpay to undocumented Title VII plaintiffs following *Hoffman*. To the contrary, the court indicated that its responses to petitioner's argument in that regard were dicta. It observed only that *Hoffman* was not relevant to the issue of petitioner's *liability*, and that the discovery sought was therefore not essential to its defense. *Id.*

Nor did the Ninth Circuit hold that immigration-related discovery could never be obtained in Title VII actions. Although it rejected petitioner's claim that *Hoffman* mandated unrestricted discovery into immigration status, the court deferred the question of whether such information could be considered in post-liability proceedings to determine the extent of backpay. Noting that respondents had proposed options that would allow for their immigration status to be disclosed *in camera*, the court left it to the district court to fashion, if needed, such procedures that would obviate any potential conflict with *Hoffman*, yet would not undermine respondents' ability to pursue their rights under Title VII. Pet. App. 5a-6a, 18a-19a, 28a.

In summary, the court below determined that the magistrate judge did not abuse her discretion in making the fact-specific finding that the requested discovery would have a serious chilling effect upon the respondents. Nor did she abuse her discretion, the court concluded, in making the equally fact-specific determination that the negative consequences of this chilling effect would not be offset by any overriding need of petitioner to conduct such discovery prior to trial. Consequently, the court held that the magistrate judge's balancing of benefits and harms pursuant to Fed.

R.Civ.P. 26, and the resulting protective order, were "neither clearly erroneous nor contrary to law." Pet. App. 28a.

In a concurring opinion, Senior Circuit Judge Eugene E. Siler, Jr.[2] noted that because of the highly deferential standard of review applicable to the district court's discretionary resolution of this discovery issue, he "might very well affirm any appeal by the plaintiffs for a denial of the protective order on the same basis, that is, the ruling was not clearly erroneous or contrary to law." Pet. App. 28a-29a.

The Ninth Circuit subsequently denied rehearing and rehearing en banc. *Rivera v. NIBCO, Inc.*, 384 F.3d 822 (9th Cir. 2004); Pet. App. 30a-54a. Petitioner now seeks certiorari.

REASONS FOR DENYING THE PETITION

The decision below is poorly suited for review by this Court because it concerns a fact-bound discovery matter, committed to the sound discretion of the district court, that reached the court of appeals only by way of interlocutory appeal. Review is also inappropriate to the extent that petitioner invites the Court, on the basis of admitted dicta, to comment on a legal issue that has not been the subject of a holding of any court of appeals. For these reasons, the petition should be denied.

I. CERTIORARI FOR INTERLOCUTORY DISCOVERY ORDERS IS HIGHLY DISFAVORED.

As a threshold consideration, it has long been settled that "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of

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[2] Judge Siler, of the Court of Appeals for the Sixth Circuit, sat by designation.

the cause." *American Construction Co. v. Jacksonville T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). Indeed, the interlocutory nature of the matter may "of itself alone" be a sufficient reason to deny certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). As this Court has noted:

> An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

Johnson v. Jones, 515 U.S. 304, 309 (1995). The foregoing considerations are especially applicable with respect to pretrial discovery rulings, immediate review of which is "not ordinarily available," *Kerr v. United States District Court*, 426 U.S. 394, 402-02 (1976), and is "generally denied." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (citing *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), and *United States v. Ryan*, 402 U.S. 530, 533 (1971)); *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) (discovery order generally not a "final order" subject to appellate review). *See also Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 232 (1979) (Rehnquist, J., concurring) ("[O]ur cases and those of the Courts of Appeals hold that review of the granting or denial of discovery is not immediately reviewable, except perhaps by way of mandamus for gross abuse of discretion on the part of the trial court").

Accordingly, certiorari with respect to interlocutory discovery matters is typically granted only in unusual circumstances. *See, e.g., United States v. Nixon*, 418 U.S. 683, 690-

92 (1974) (certiorari granted, upon interlocutory appeal and petition for mandamus relief from discovery ruling, because of Court's reluctance to require the President to place himself in contempt as condition for review); *Cheney v. United States District Court*, 540 U.S. ___, 124 S.Ct. 2576, 2587 (2004) (certiorari granted from discovery ruling where substantial potential intrusions upon Executive privilege were alleged, "remov[ing] this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable").

In the instant case, there is nothing that overcomes the strong presumption against interlocutory review. Should this matter—which has already been stayed by the district court for more than two years due to the pendency of this appeal before the Ninth Circuit—eventually proceed to trial, petitioner will suffer no imaginable harm that could not be entirely remedied on appeal from a final judgment. In the event that petitioner were successfully to challenge an adverse judgment on the basis that it should have been permitted to discover respondents' immigration status prior to trial, and thereby avoid either liability under the supplemental state law claims or entry of all or part of a monetary award, [3] that judgment would readily be modified via remittitur.

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[3] Specifically, petitioner contends that a showing that some of the respondents were undocumented at the relevant times could enable it to limit its backpay liability to them should *Hoffman* be found to apply to Title VII cases, 364 F.3d at 1062, 1070, or to defend against respondents' state law claims in their entirety, *id.* at 1072-73. But it is unclear why these issues—which have not been decided by any court in this action—would not be adjudicated by the district court in the first instance and without the necessity of any appeal from the judgment, utilizing mechanisms such as the post-trial in camera procedure referenced by the Ninth Circuit, *id.* at 1070, 1075. (This point is also discussed briefly at Section II.B, *infra.*) In any event, denial of interlocutory certiorari does not prejudice a party's ability to seek certiorari as to the same matters after the final judgment. *Hamilton-Brown Shoe Co., supra,* 240 U.S. at 259.

Alternatively, if petitioner is not found liable for any federal or state law violation, the potential need for the discovery sought by petitioners would be entirely obviated.

Especially in light of the prejudice to respondents of still further delay before their claims are finally heard, and because this appeal may turn out to be an unnecessary burden on judicial resources, this case is not appropriate for review at this premature stage. Petitioner presents no reason to depart from this Court's well-established presumption against hearing matters prior to a final judgment.

II. BECAUSE THE MAGISTRATE JUDGE'S ORDER WAS NOT "CLEARLY ERRONEOUS," "CONTRARY TO LAW," OR AN ABUSE OF DISCRETION, REVIEW WOULD BE INAPPROPRIATE.

Under 28 U.S.C. § 636(b)(1)(A), a magistrate judge's pretrial order may be reconsidered by the district court "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." *See also* Fed.R.Civ.P. 72(a). The Ninth Circuit employs the same standard when reviewing a district court's denial of a motion to reconsider such an order. *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (affirming district court's refusal to reconsider magistrate judge's protective order, and noting "the very broad discretion of the district courts" to enter such orders); *see also Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001) (reviewing district court's discovery and evidentiary orders for abuse of discretion).

The deferential level of review accorded district courts' discovery orders was explained by this Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984):

> [W]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent

> 'equitable power of courts of law over their own process, to prevent abuses, oppression, and injustices'. [citation omitted]
>
> . . .
>
> To be sure, Rule 26(c) confers broad discretion on the trial court to determine when a protective order is appropriate and what degree of protection is required. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

Id. at 35-36. *See also Brandt v. Wand Partners*, 242 F.3d 6, 18 (1st Cir. 2001) ("Discovery decisions by the . . . district court are reviewed for abuse of discretion, and the discretion in this area is very broad, recognizing that an appeals court simply cannot manage the intricate process of discovery from a distance."); 8 C. WRIGHT, A. MILLER & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2036, p. 489 (2d ed. 1994, Supp. 2004) ("a court may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of [Rule 26(c)]").

This, of course, is in keeping with "the principle that an appellate court reviews questions of law and may not substitute its own view of the facts or make new fact-findings. . . . Whether the fact issues in the trial court are determined by a jury or a judge, the appellate court limits itself to questioning whether there is a substantial evidentiary basis for the determinations." F. JAMES & G. HAZARD, CIVIL PROCEDURE 667 (3d ed. 1985). *See also* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

As described below, the Ninth Circuit properly concluded that the district court's factual findings were not clearly erroneous. Nor was the district court's ruling contrary to law. Certiorari should therefore be denied.

A. The Ninth Circuit Held Simply That The Magistrate Judge's Fact-Based Rule 26 Balancing Was Not "Clearly Erroneous."

Despite petitioner's effort to characterize the opinion below as a wholesale departure from settled legal precedent, it is nothing of the sort. Quite to the contrary, the core holding of the court below was simply its determination, under the applicable standard of review, that the magistrate judge did not "clearly err" in granting the protective order at issue. Lacking any basis for finding an abuse of discretion, the Ninth Circuit let stand the magistrate judge's intrinsically factual balancing of the harms and benefits of the proposed discovery. As the court summarized:

> In this case, the protective order was justified because the substantial and particularized harm of the discovery—the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights—outweighed NIBCO's interests in obtaining the information at this early stage in the litigation. We therefore hold that the district court's decision not to disturb the order was neither erroneous nor contrary to law.

364 F.3d at 1064. Accordingly, the Ninth Circuit held only that the district judge's decision not to reject the magistrate judge's Rule 26 balancing analysis was not an abuse of discretion.

In sum, the district court undertook the assessment, pursuant to Rule 26's required balancing of harms against benefits, that it was best positioned to conduct. It weighed petitioner's particularized arguments concerning its need for

the information, *see, e.g.*, Pet. App. 63a-66a, ER 0084-0109, against the chilling effect that such discovery would have upon the respondents in this case and their ability to press forward with their discrimination claims.[4] Properly applying a deferential level of review, the Ninth Circuit found no clear error in that assessment. Respondent's disagreement with the district court's result, without more, hardly compels the conclusion that the district court "clearly erred." *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ('clearly erroneous' standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."). To the contrary, the fact that unscrupulous employers may retaliate against complaining workers by using their undocumented status against them is well

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[4] Federal courts have long recognized that discovery into a plaintiff's immigration status may exert a powerfully intimidating effect that would substantially burden her ability to enforce her workplace rights. Accordingly, these courts have held that immigration-related discovery may properly be limited in order to strike an appropriate balance between the parties' interests. *See, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied sub nom. Griffin & Brand of McAllen v. Reyes*, 487 U.S. 1235 (1988) (denying discovery concerning plaintiffs' immigration status, noting that such discovery could inhibit their pursuit of their legal rights "because of possible collateral wholly unrelated consequences"); *Montelongo v. Meese*, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986) (district court barred inquiry into class members' immigration status); *John Dory Boat Works, Inc.*, 229 N.L.R.B. 844, 852 (1977) (National Labor Relations Board ("NLRB") enjoined employer from calling employees' immigration status into question, noting that the impact upon witnesses of immigration-related questioning at Board proceeding "ranged from unsettling to devastating and certainly affected their ability to testify."). *See also Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-71 (9th Cir. 2000) (permitting plaintiffs to proceed anonymously, and noting that "complaining employees are more effectively protected from retaliation by concealing their identities than by relying on the deterrent effect of *post hoc* remedies", and that "[a]s guest workers in Saipan, plaintiffs may be deported if they lose their jobs.").

established.[5] Moreover, for reasons essentially identical to those cited by the district court herein, the majority of post-*Hoffman* cases considering the discovery issue have likewise denied employers' attempts to ascertain plaintiffs' immigration status.[6] Though not determinative, these cases sug-

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[5] *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (undocumented workers voting in favor of union representation reported by employer to the Immigration and Naturalization Service ("INS")); *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997) (undocumented workers active in union organizing effort fired and reported to the INS); *NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d 1125 (7th Cir. 1987) (enforcing NLRB order finding unlawful employer threats to report organizing workers to the INS); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998) (employer reported undocumented plaintiff to the INS immediately after first state agency proceeding concerning her claim for unpaid wages, resulting in her arrest and detention); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002) (employer had undocumented plaintiff detained by INS for fourteen months in retaliation for filing wage claim). *See also* Nancy Cleeland, *Unionizing is Catch 22 for Illegal Immigrants' Jobs: Undocumented Status Makes Them Vulnerable to Workplace Retaliation*, LOS ANGELES TIMES, Jan. 16, 2000 (available at 2000 WL 2201447).

Other evidence suggests a close correlation between the presence of labor and employment disputes in a workplace and the occurrence of a federal immigration raid. *See* Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. R. LAW & SOC. CHANGE 389, 390-92 (2004) (in New York district of INS, during thirty-month period from 1997 to 1999, 102 of 184 INS-raided businesses were subject to a labor agency investigation or proceeding at the time of the raid).

[6] *See, e.g., EEOC v. First Wireless Group, Inc.*, ___ F.R.D. ___, 2004 WL 2733612, *1-3 (E.D.N.Y. Nov. 19, 2004) (following the opinion below and affirming order denying discovery of charging parties' immigration status); *Centeno-Bernuy v. Becker Farms*, 219 F.R.D. 59, 61 (W.D.N.Y. 2003) (rejecting employer attempts to discover plaintiffs' current residences and places of employment, even assuming *arguendo* the relevance of that information, in view of intimidating effect of such discovery); *Cortez v. Medina's Landscaping*, 2002 WL 31175471, *1

gest that the magistrate judge's ruling was not so unreasonable as to be an abuse of discretion.

(N.D. Ill. Sept. 30, 2002) (denying defendant's motion to discover plaintiffs' citizenship status); *Rodriguez v. The Texan, Inc.*, 2002 WL 31061237, *2 (N.D. Ill. Sept. 16, 2002) (granting plaintiffs' motion *in limine* to exclude evidence of their undocumented status for purposes of challenging their entitlement to damages); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (granting Rule 26(c) protective order barring immigration-related questioning); *Flores v. Amigon*, 233 F.Supp.2d 462, 464-65 (E.D.N.Y. 2002) (granting protective order against discovery of immigration status); *Flores v. Albertsons, Inc.*, 2002 WL 1163623, *5 (C.D. Cal. Apr. 9, 2002) (affirming denial of employer's motion to compel production of immigration documents); *Liu v. Donna Karan Intl., Inc.*, 207 F.Supp.2d 191, 192-93 (S.D.N.Y. 2002) (denying discovery of immigration status information).

Consistent with these cases, neither the U.S. Equal Employment Opportunity Commission ("EEOC") nor the NLRB have interpreted *Hoffman* as requiring them to initiate inquiries as to complaining workers' immigration status. *See* EEOC Directives Transmittal No. 915.002, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002) ("When enforcing [the federal employment discrimination statutes], EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge."), available at http://www.eeoc.gov/policy/docs/undoc-rescind.html. The EEOC's administrative interpretations of Title VII are "entitled to great deference." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). In the same respect, *see* NLRB General Counsel Memorandum GC 02-06, *Procedures and Remedies for Discriminatees Who May be Undocumented Aliens after Hoffman Plastic Compounds, Inc.* (July 19, 2002) ("Regions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. . . . The law—IRCA—protects employees against harassment by an employer which seeks to reverify their immigration status without cause."), available at http://www.nlrb.gov/nlrb/shared_files/gcmemo/gcmemo/gc02-06.asp?useShared=/nlrb/legal/gcmemo/gcmemo/default.asp. Rules of the NLRB are accorded "considerable deference." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

Because the Ninth Circuit properly declined to reconsider the magistrate judge's fact-dependent result, the opinion below is unsuited for certiorari.

B. The Opinion Below Does Not Conflict With The Cases Petitioner Cites.

Try as it might to portray the opinion below as a 'profound subversion' of federal discovery principles (Pet. 2, 5), petitioner cannot do so. Review on such a basis is thus unwarranted as well.

Petitioner first contends that the Ninth Circuit announced the existence of a special "privacy right" inhering in respondents as its basis for affirming the magistrate judge's Rule 26 balancing determination. But respondents have never argued the existence of any "privacy right" as justification for the protective order. Nor did the court below ever mention such a construct, let alone rely on it. (Indeed, the word "privacy" does not appear in the opinion.) Moreover, the cases cited by petitioner discussing the privacy interests calling for Fourth Amendment protection in the criminal context offer no guidance on the scope of protection provided by Fed.R.Civ.P. 26(c) against "annoyance, embarrassment, oppression, or undue burden or expense" in a civil case.

Next, petitioner argues that the magistrate judge could instead have required respondents to respond to pretrial immigration-related discovery subject to a prohibition on the disclosure to third parties of the information gained thereby. Yet petitioner rejected this proposal below. ER 0051-57, 0200. Moreover, although petitioner recites general principles regarding "liberal discovery" and the availability of depositions, it cannot explain why it was *contrary to law* for the court below to find that deferring such discovery until after trial was a superior compromise solution adequately

protecting all parties' interests.[7] Likewise, petitioner's reliance on two First Amendment cases, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) and *Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987), for the asserted proposition that simple non-disclosure orders adequately protect the parties' interests, is misplaced. Neither case involved an order that particular discovery not be had. Instead, they upheld protective orders restricting access to the discovered information to the litigants, rejecting arguments that it should have been released to the general public.

In the same regard, petitioner's characterization of *In re Grand Jury Subpoenas*, 836 F.2d 1468 (4th Cir. 1988), is misleading. In that case, the Fourth Circuit actually recognized the *inadequacy* of non-disclosure orders for insulating witnesses from potential criminal prosecution. *Id.* at 1476-77. *See also Andover Data Services, a Div. of Players Computer, Inc. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1083 (2d Cir. 1989) (overturning, as insufficient, district court's protective order limiting access to witness's deposition testimony, observing that such measures "provide[ ] no guarantee that compelled testimony will not somehow find its way into the government's hands for use in a subsequent criminal prosecution.").

Nor does the decision below render *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), "an empty shell," as petitioner charges. As this Court expressly recognized in setting forth the contours of the after-acquired

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[7] The single authority petitioner relies upon in this respect, *CSC Holdings v. Redisi*, 309 F.3d 988, 993-94 (7th Cir. 2002), is unavailing. In that case, the district court had plainly abused its discretion by denying discovery as to a statute of limitations question at "the heart of [the defendants'] defense" which, if borne out, would have relieved them of all liability therein. By comparison, as the court below pointed out, the discovery petitioner seeks here not only is *not* potentially dispositive, it bears upon *no* aspect of petitioner's liability.

evidence doctrine, "The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the [ADEA] is not an insubstantial one." *Id.* at 363. The Court also stated that the after-acquired evidence doctrine should be applied flexibly in the event that "extraordinary equitable circumstances" so dictate. *Id.* at 362. [8] *McKennon* therefore instructed the district courts to invoke the Federal Rules as needed to address those concerns—precisely as the Ninth Circuit found that the magistrate judge appropriately did in this case.[9]

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[8] The EEOC, in its administrative guidance on *McKennon*, has reiterated this concern. *EEOC Enforcement Guidance on After Acquired Evidence and McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 65 E.P.D. Par. 43, 368 (1995)*, No. 915.002 (Dec. 14, 1995) ("Launching a retaliatory investigation of a [charging party's] background in response to a charge or complaint of discrimination is one such equitable circumstance [of the type noted by *McKennon* as warranting flexible application of the doctrine].").

[9] *McKennon's* concern in this regard is echoed by the many courts that have expressly criticized employers' use of overbroad discovery in pursuit of after-acquired evidence. As the Third Circuit observed:

> [T]he efficacy of the after-acquired evidence tactic has not escaped the attention of defense counsel . . . The prospect of a defendant's thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct . . . may chill the enthusiasm and frequency with which employment discrimination claims are pursued, even in cases where the victim of discrimination has nothing to hide, let alone cases where the potential plaintiff is not entirely blameless. . . . [T]he likely consequence of the widespread exploitation of after-acquired evidence will be underenforcement of Title VII and ADEA, and consequently underdeterrence of discriminatory employment practices.

Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1236 (3d Cir. 1994), *cert. granted, judgment vacated, and remanded, Harleysville Life Ins. Co. v. Mardell*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part by Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995). *See also Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280

Nothing in the opinion below, therefore, conflicts with *McKennon*. Petitioner's argument essentially reduces to a complaint that the Ninth Circuit declined to view *McKennon* as amounting to a blank check to conduct discovery whenever a defendant merely asserts that such discovery could conceivably turn up facts mitigating its backpay exposure. By its own terms, however, *McKennon* has never stood for such a proposition. That facts constituting after-acquired evidence may 'typically' be acquired during discovery hardly compels the remarkable *non sequitur* that *any* discovery, no matter how invasive or lacking in any specific basis, must therefore be permitted. Indeed, petitioner has not cited a single court of appeals case holding that *McKennon* mandates discovery regarding potential employee wrongdoing, or eliminates the discretion of the district courts under Fed.R. Civ.P. 26 to fashion protective orders where appropriate.

In addition, petitioner argues against bifurcating liability from remedies proceedings. It conclusorily states that "[a]ny collateral consequence of dissuading illegal aliens from

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F.3d 1110, 1116 (7th Cir. 2002) (discussing instances where doctrine "might give employers an incentive to dig for dirt in the litigation process in order to deter suits."); *Washington v. Lake County*, 969 F.2d 250, 255 (7th Cir. 1992) (approving of application of doctrine so as to "weaken[ ] the incentive for an employer to engage in a fishing expedition"); *Miller v. AT&T*, 83 F.Supp.2d 700, 706 (S.D. W.Va. 2000) ("Even if the after-acquired evidence doctrine applies, it is not intended to be used as a fishing expedition by employers to find wrongful conduct on the part of their terminated employees for the purpose of limiting their damages."); *Perry v. Best Lock Corp.*, 1999 WL 33494858, *3 (S.D. Ind. Jan. 21, 1999) ("[The employer] has not provided any information suggesting it has a specific basis for believing that an after-acquired defense might be developed here. . . . On this record, therefore, the subpoenas look like nothing more than a fishing expedition, or, more accurately, an exercise in swamp-dredging and muck-raking.") (emphasis in original). *See also Dodge v. Hunt Petroleum Corp.*, 1998 WL 355495, *1 (N.D. Tex. June 26, 1998) (broad scope of defendant's efforts to discover after-acquired evidence may support inference of retaliatory purpose).

bringing suit under such a regime would be *no different* than if the discovery were provided at the outset," and that "there is no logical justification for ruling that the discovery of plaintiffs' immigration status should be permitted eventually but *deferred* until post trial." (emphases in original) Pet. 13. Petitioner, however, offers no authority to support its categorical, generalized assertions regarding the supposed 'illogic' of bifurcation.[10] Likewise, petitioner argues against

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[10] Many courts have approved of bifurcating the liability and damages phases of a trial where sensitive and potentially prejudicial after-acquired evidence has been involved. *See, e.g., Mardell v. Harleysville Life Ins. Co., supra,* 65 F.3d at 1074 ("bifurcation may sometimes be advisable as a vehicle to ensure that after-acquired evidence not be improperly used during the liability phase"); *EEOC v. Fargo Assembly Co.*, 142 F.Supp.2d 1160, 1165 (D. N.D. 2000) ("Bifurcation is appropriate in a true McKennon situation because, while subsequently-obtained evidence or wrongdoing may not be used to prove or disprove liability, it may be relevant to determination of damages."); *Garrett v. Langley Federal Credit Union*, 121 F.Supp.2d 887, 995 (E.D. Va. 2000) (bifurcating due to existence of after-acquired evidence that could mitigate backpay award); *Nyazie v. Kennedy*, 1998 WL 472504, *3 (E.D. Pa. July 27, 1998) (ordering bifurcation and noting that doing so "could substantially shorten the period of trial as a whole" if defendant prevailed on liability, and where testimony of liability witnesses would be irrelevant in damages phase); *Finch v. Hercules Inc.*, 1995 WL 785100, *3 (D. Del. Dec. 22, 1995) (court proposed bifurcating liability from damages so that after-acquired evidence relevant to damages alone would not create "confusion and prejudice" at liability stage).

The relevant administrative guidances of the EEOC and NLRB are consistent with bifurcating liability from remedies determinations so as to limit the introduction of immigration status information to the latter proceedings. *See* EEOC Directives Transmittal No. 915.002, *supra* ("Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge."); NLRB General Counsel Memorandum GC 02-06, *supra* ("The *Hoffman* decision clearly established that an employee's immigration status may become a relevant factor *during the compliance and settlement phases*.") (emphasis supplied). *See also Tuv Taam Corp.*, 340 N.L.R.B. No. 86, 2003 WL 22295361 (N.L.R.B.), *8

bifurcation on the basis of two intermediate California appellate court decisions it suggests renders respondents' immigration status relevant to their standing to sue under state law (Pet. 14-15), notwithstanding statutory provisions to the contrary.[11] The mere existence of this untested legal theory, however, is not a reason for granting certiorari.

As can be seen, these arguments concerning bifurcation, however conclusory, are arguments that the district court should properly be given an opportunity to address in the first instance. Despite petitioner's suggestion to the contrary, *see, e.g.*, Pet. 13, and as the Ninth Circuit expressly noted in its opinion, the district court did not decide the bifurcation question, but deferred it pending the outcome of the matter on appeal. Pet. App. 6a, 19a. Certiorari implicating this question, which has not yet been addressed by either the district court or court of appeals, and which is quintessentially within the province of the trial court to determine in the first instance, would be ill advised. *See, e.g., Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1128 (7th Cir. 1999)

(2003) (questions regarding immigration status generally must be litgated at compliance, not liability, stage).

[11] *See* CAL. GOV'T CODE § 7285 (establishing that "all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status", and that "[t]he provisions of this section are declaratory of existing law"). Section 7285 also provides that "in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law." *Id.*; *see also Hernandez v. Paicius*, 109 Cal.App.4th 452, 460 (Cal. Ct. App. 2003) ("These statutes leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws. Thus, if an employer hires an undocumented worker, the employer will also bear the burden of complying with this state's wage, hour and workers' compensation laws.").

("The deferential standard by which we review challenges to bifurcation is based on the notion that the district court is in a far better position to assess and attempt to reconcile the competing interests of each party, judicial economy and unfair prejudice.").

For these reasons, petitioner's authorities notwithstanding, the district court did not act in a manner contrary to law. Review on such a basis would be unwarranted.

III. THE DECISION BELOW CREATES NO SPLIT OF AUTHORITY BECAUSE IT IS THE FIRST COURT OF APPEALS OPINION TO ADDRESS *HOFFMAN*, AND BECAUSE THE LANGUAGE PETITIONER POINTS TO IS NOT PART OF THE HOLDING BELOW.

Petitioner invites the Court to use this case as a vehicle for extending the backpay holding of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), to cases arising under Title VII. That invitation should be declined.

A. The Ninth Circuit's Discussion Of *Hoffman*'s Applicability To Title VII Is Express Dicta.

Although petitioner acknowledges that the Ninth Circuit's comments on *Hoffman* and its possible applicability to Title VII were no more than "a lengthy dictum," Pet. 15, or a "suggestion," Pet. 16, it nonetheless urges this Court to grant certiorari to review that dicta.

Petitioner is surely correct in that the observations with which it takes issue are classic dicta. As already noted, the sum total of the Ninth Circuit's holding was simply that even assuming Title VII plaintiffs' immigration status is relevant after *Hoffman*, the district court did not clearly err or act contrary to law in the Rule 26 balancing analysis that led it to grant the protective order. That the opinion also discusses one of petitioner's main contentions on appeal, that *Hoffman*

applies to Title VII cases, should hardly be surprising. But in so doing the court below took pains to note, correctly, that this discussion formed no part of its Rule 26 holding, and that therefore it saw no need to reach the issue. Pet. App. 18a.

Because those observations are not part of the holding below, they are not a proper subject of certiorari. "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (citations omitted). *See also Bunting v. Mellen*, ___ U.S. ___, 124 S.Ct. 1750, 1754 (2004) ("We sit, after all, not to review errors in dicta[.]") (Scalia, J., dissenting).

B. No Other Circuit Has Discussed *Hoffman*, Let Alone Attempted To Interpret It.

The decision below is the only one by any court of appeals to mention *Hoffman* in any more than a passing manner.[12] Petitioner, therefore, cannot allege the existence of an inter-circuit conflict created by the Ninth Circuit's opinion for the simple reason that, at this point in time, there are no other federal appellate treatments of *Hoffman* with which the opinion can conflict.

Indeed, petitioner offers only speculation that future courts of appeal may draw upon language in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), a pre-*Hoffman* case, in such a manner as to create a conflict with the decision below. The mere possibility that such a conflict might arise at some point in the future, however, is hardly a proper ground for certiorari.

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[12] Just three other court of appeals decisions contain citations to *Hoffman*. None contain any substantive discussion of *Hoffman*. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002) (noting *Hoffman*'s backpay holding); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003) (citing *Hoffman* concerning limited jurisdiction of National Labor Relations Board); and *Baker v. IBP, Inc.*, 357 F.3d 685, 689 (7th Cir. 2004) (noting *Hoffman*'s backpay holding).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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